IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JIM A. TOBIN, Respondent, v. DEPARTMENT OF LABOR & INDUSTRIES, Petitioner.	)	No. 81946-7 En Banc Filed August 12, 2010

MADSEN, C.J.—Jim Tobin, an injured worker, received workers' compensation benefits and settled a lawsuit with the responsible third party, as authorized by Washington's third party recovery statute, chapter 51.24 RCW. A portion of the settlement funds was designated "pain and suffering" damages. Citing its authority under the statute to seek reimbursement for benefits paid, the Department of Labor and Industries (Department or L&I) used the entire settlement sum in its reimbursement calculation and the Board of Industrial Insurance Appeals (Board) affirmed. Tobin appealed, and the trial court reversed. The Court of Appeals affirmed the trial court, holding that the Department had not compensated Tobin for pain and suffering. We

agree and hold that chapter 51.24 RCW does not authorize the Department to seek reimbursement of damages awarded for pain and suffering. Accordingly, we affirm.

FACTS

In June 2003, while working for Saybr Contractors, Inc., Tobin was injured when a crane boom, operated by a third party, swung unexpectedly and crushed him against a post. The Department accepted Tobin's subsequent workers' compensation application and paid him time loss compensation and medical benefits.

In March 2005, the Department determined that Tobin was "totally and permanently disabled" and began paying pension benefits. Tobin brought a lawsuit against the third party responsible for the accident, and in September 2005 settled for $1.4 million in damages, $793,083.16 of which was categorized as pain and suffering.

On September 29, 2005, the Department issued an order informing Tobin that it planned to seek reimbursement for workers' compensation benefits it had paid to Tobin, and that his $1.4 million award would be distributed under RCW 51.24.060(1). The Department's distribution calculation included the $793,083.16 that Tobin's settlement had designated for pain and suffering.

Tobin appealed the Department's distribution calculation to the Board. He argued the Department should not have included the $793,083.16 pain and suffering damages in its recovery figure used to calculate distribution of his third party settlement award. Tobin reasoned that because the Department never compensated him for pain and suffering, it could not seek reimbursement from the pain and suffering portion of his

award. Tobin also argued that including his pain and suffering damages in the distribution formula amounted to an unconstitutional taking. The Board rejected Tobin's position and upheld the Department's decision.

Tobin appealed to the superior court, which reversed the Board. The superior court relied on *Flanigan v. Department of Labor & Industries*, 123 Wn.2d 418, 423-24, 869 P.2d 14 (1994), to hold that the Department can be reimbursed only for benefits paid and that the Department had not compensated Tobin for pain and suffering.

The Department appealed to the Court of Appeals, which affirmed the superior court after concluding that "L&I did not, and will never, compensate Tobin for his pain and suffering, therefore it cannot be 'reimbursed' from funds designated to compensate him for his pain and suffering." *Tobin v. Dep't of Labor & Indus.*, 145 Wn. App. 607, 616, 187 P.3d 780 (2008) (citing *Flanigan*, 143 Wn.2d at 426). The Court of Appeals reasoned that "[b]ecause the legislative history does not provide evidence that the legislature intended to allow L&I to access the pain and suffering portion of a third party recovery to reimburse it for money it paid to compensate an injured worker's other losses, i.e., medical expenses, its argument fails." *Tobin*, 145 Wn. App. at 618.

The Court of Appeals went on to address Tobin's takings argument, reframing the issue as a due process notice violation. The court observed that "RCW 51.24.060 does not provide injured workers with sufficient notice that damages . . . earmarked [as 'pain and suffering' in a settlement or jury award] are assets that may be attached to reimburse and relieve L&I of its responsibility to pay compensation which the injured worker is due

for his other losses." *Id*. at 620. Based on the absence of notice in the statute, the court held that Tobin's right to due process under the Washington Constitution was violated. *Id*. at 618; Const. art. I, § 16.

The Court of Appeals awarded Tobin reasonable attorney fees on review. Tobin requests attorney fees pursuant to RAP 18.1 and RCW 51.52.130 for the appeal in this court.

ANALYSIS

The central issue in this case is whether chapter 51.24 RCW authorizes the Department to include Tobin's pain and suffering damages in the distribution calculation. In order to answer this question, we must discuss the basic history and framework of Washington workers' compensation law, our decision in *Flanigan*, 123 Wn.2d 418, and the meaning of a post-*Flanigan* legislative amendment, RCW 51.24.030(5).

Washington State has abolished workplace injury torts and established Title 51 RCW, the workers' compensation statutes. RCW 51.04.010. Under the statutes, an injured worker generally may not bring a suit in tort, but is instead limited to recovering workers' compensation benefits from the Department. RCW 51.04.060 (describing benefits and burdens of statute as mandatory, exclusive remedy).

The third party recovery statutes, chapter 51.24 RCW, provide an exception. An injured worker is permitted to sue "a third person, not in the worker's same employ [who] is or may become liable to pay damages on account of a worker's injury." RCW 51.24.030(1).

"[A]ny recovery" obtained from a third party suit "shall be distributed" according to the statute's distribution formula. RCW 51.24.060(1). The distribution formula requires payment in the following order: (a) attorney fees and costs, (b) 25 percent to the injured worker free of any claim by the Department, (c) to the Department "the balance of the recovery made, but only to the extent necessary to reimburse [the Department] for benefits paid" and (d) to the injured worker "[a]ny remaining balance." *Id*.

In *Flanigan*, 123 Wn.2d 418, we held that "recovery" excludes damages for loss of consortium, and in dicta, suggested that other noneconomic damages, such as pain and suffering, may also be excluded. *Id*. at 423, 426. We observed that the workers' compensation statute makes no statement clearly defining the types of damages that benefits are supposed to compensate for leaving the court to interpret the legislature's intent.

In *Flanigan* we noted that the Department uses "a lesser percentage of the employee's salary" to calculate benefits. *Id*. at 423 (citing RCW 51.32.050, .060, .090). As such, we found the Department did not pay the claimant any benefits for the purpose of compensating for loss of consortium. *Id*. Referencing the language of RCW 51.24.060(1)(c), we concluded that where the Department has not paid out benefits for a type of damages, it cannot seek reimbursement from that type of damages. *Id*. at 426. We also relied on the dictionary definition of "reimburse," a term not defined by the statute, to support this conclusion. *Id*. We held that "recovery" excludes damages for loss of consortium and in dicta suggested that other noneconomic damages, such as pain

and suffering, may also be excluded. *Id*. at 423, 426.

After *Flanigan*, the legislature amended the statute to define "recovery" as "all damages except loss of consortium." RCW 51.24.030(5). The amendment appears to codify the holding of *Flanigan*. However, the parties debate whether it does more. The Department argues that the legislature also intended to limit the reasoning of *Flanigan* to loss of consortium damages. Tobin disputes this interpretation and argues that the reasoning of *Flanigan* "can be extended to third party recoveries of pain and suffering damages." Resp't's Answer to Pet. for Review at 7.

The Department references the plain language of the amendment and argues that interpreting pain and suffering as excluded from recovery is to rewrite the statute's definition of "recovery" as "all damages except loss of consortium, **and pain and suffering**." Br. of Appellant [L&I] at 3. The Department argues that the court may not rewrite the amended statute in this manner. Left with the plain language of the amendment, the court has an "either or" choice. Pain and suffering is not "loss of consortium"; therefore it must be included in "recovery."

Tobin counters that RCW 51.24.030, including the amendment, should not be read in isolation, but in context with RCW 51.24.060(1)(c), which gives the Department access to recovery "only to the extent necessary to reimburse the department…for benefits paid." RCW 51.24.060(1)(c); Resp't Tobin's Suppl. Br. at 8 (citing *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001)). This argument is particularly compelling because (i) *Flanigan* relied on this section of the statute to

support its reasoning and (ii) the legislature did not alter this section.

We agree with Tobin that if the legislature intended to limit the reasoning of *Flanigan*, it could have clearly expressed its intent by defining "recovery" to include all noneconomic damages except for loss of consortium. Alternatively, it could have clearly expressed which types of damages the statute is meant to provide compensation for by defining the term "reimburse." It did not. Accordingly, we conclude the legislature intended to codify the holding of *Flanigan* and left the reasoning of *Flanigan* undisturbed.

In *Flanigan* this court emphasized that the statute's calculation of benefits involves only a percentage of salary and makes no explicit reference to any other category of damages. RCW 51.32.050, .060, .090. Following this reasoning, the benefits calculation does not involve pain and suffering any more than it does loss of consortium.

The Department argues, though, that extending *Flanigan* to exclude reimbursement for pain and suffering creates conceptual difficulties. The Department argues that Tobin will receive pension benefits for the rest of his natural life, rather than for the rest of his working life or until he reaches retirement age. Thus, the Department argues, benefits may be viewed as representing more than medical expenses and lost wages. The Department cites to Arthur Larson's treatise, explaining that "[a] compensation system, [is] unlike a tort recovery, [and] does not pretend to restore to the claimant what he or she has lost" but instead grants the claimant a sum certain on which to live. 1 Arthur Larson, *Larson's Workers' Compensation Law* § 1.03[5] (2009).

A form of Larson's argument, that reimbursement under the statute should be viewed broadly rather than separated into damage types, was urged by the dissent in *Flanigan*, but the majority found that other considerations outweighed this argument. *Flanigan*, 123 Wn.2d at 430 (Madsen, J., dissenting) ("the Act does not distinguish based on the nature of the damages which flow from the worker's injury"). We adhere to our position in *Flanigan.*

The Department raises another concern that arises when *Flanigan* is applied in the context of pain and suffering. Specifically, the Department points out that Tobin's third party claim settled for $1.4 million. The amount was allocated as follows: $29,326.84 for medical expenses, $14,647.00 for future medical expenses, $562,943.00 for total wage loss (past and future), and $793,083.16 for pain and suffering. The Department notes the category of pain and suffering constitutes the largest amount (over $230,000.00 more than total wages lost) and represents approximately 57 percent of the total award. The Department argues that when a large dollar amount is allocated to pain and suffering, the specter of fraud or collusion may arise. Moreover, the Department says, if Tobin prevails and similar cases follow in his wake, large allocations to pain and suffering will have a significant impact on the Department's fund and potentially its solvency.

Tobin recognizes that the solvency of the fund is a legitimate consideration but argues that it is not unreasonable to limit the Department's recovery to reimbursement for benefits actually paid. Tobin cites *Wilson v. State*, 142 Wn.2d 40, 56, 10 P.3d 1061 (2000), in which the dissent argued that considering the impact of a decision on the

replenishment of the Medicaid fund is a legitimate concern, but fund replenishment should still be limited to those damage types that the fund actually paid out as reimbursement. The same view expressed in this dissent was later adopted by the United States Supreme Court in *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006). We do not find concerns over solvency sufficient to upset our interpretation of the statute.

In regard to concerns about collusion, fraud was a concern in *Flanigan* as well, but the court ultimately decided that other considerations outweighed worries over fraud in the context of loss of consortium. *Flanigan*, 123 Wn.2d at 429 (Andersen, C.J., dissenting) ("majority's decision also opens the door to abuse and manipulation . . . [i]n the settlement context, [where] parties may allocate the recovery . . . in order to defeat the funds' reimbursement right"). Moreover, the Department has presented no evidence that Tobin engaged in any fraud or collusion in this case. We are not convinced that general concerns over fraud are sufficient to upset our interpretation of the statute.

For the reasons discussed above, we hold that chapter 51.24 RCW does not authorize the Department to subject pain and suffering damages to its reimbursement calculation.

Takings and Due Process

Tobin argues that his pain and suffering damages, as the liquidated form of a chose in action, are his private property. Resp't Tobin's Suppl. Br. at 16; Resp't's Answer to Pet. for Review at 12-13 (citing RCW 4.08.080; *Woody's Olympia Lumber, Inc. v. Roney*, 9 Wn. App. 626, 513 P.2d 849 (1973); *In re Marriage of Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984)). He further argues if the statute subjects his private property to the distribution calculation it is a regulatory taking without due process of law in violation of the United States Constitution and Washington State Constitution. Resp't Tobin's Suppl. Br. at 16 (citing Const. art. I, § 16; U.S. Const. amend. 14, § I).

Tobin's takings argument is in the alternative. He states that the Department's interpretation of the statute is what renders the statute unconstitutional. Since we hold that the Department lacks authority under the statute to include Tobin's pain and suffering damages in its distribution calculation, and must reimburse Tobin for any funds wrongfully withheld, we need not reach Tobin's takings claim.

Nevertheless, we think one point with regard to the Court of Appeals' discussion of due process is important enough to require clarification. The Court of Appeals held RCW 51.24.060 violates due process because it provides the injured worker with inadequate notice that his recovery from a third party tortfeasor may be subject to department distribution. Even if the Court of Appeals were correct, ambiguity in a statute triggers the need for court interpretation, not a finding that the statute violates substantive

due process. *E.g.*, *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Attorney Fees

Tobin also requests attorney fees pursuant to RAP 18.1 and RCW 51.52.130. The Department concedes that if Tobin prevails on appeal, he is entitled to attorney fees under RCW 51.52.130. The trial court found Tobin entitled to attorney fees if and when the accident fund or medical aid fund is affected. Clerk's Papers at 54. The Court of Appeals affirmed the trial court's award and awarded additional attorney fees on appeal.

Under RCW 51.52.130, where a worker appeals a decision of the Board of Industrial Insurance Appeals, he is entitled to fees and costs if (a) the Board's decision is "reversed or modified" and (b) "the accident fund or medical aid fund is affected by the litigation." RCW 51.52.130. In an appeal by the Department, the worker is entitled to fees and costs if "the worker['s] . . . right to relief is sustained." *Id*. In both instances, the worker is entitled to "the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department." *Id*. RAP 18.1 details procedural requirements for a party requesting attorney fees.

Tobin requested fees and costs in his brief pursuant to RAP 18.1. In light of our holding, Tobin has prevailed before this court. Our decision will directly affect the fund by reducing the amount the Department may recover as reimbursement. Tobin is therefore entitled to attorney fees and costs for his appeal to the trial court. Our decision also sustains Tobin's relief secured by the trial court and Court of Appeals. Thus, he is

also entitled to attorney fees and costs incurred before the Court of Appeals and this court.

CONCLUSION

The legislature amended the definitional section of the statute that codified the explicit holding of *Flanigan*: the term "recovery" excludes third party damages for "loss of consortium." However, the legislature did not revise RCW 51.24.060(1)(c), the section restricting the Department to recovery "to the extent necessary . . . for benefits paid" or clearly define what types of damages the statute intends to provide compensation for. Because *Flanigan*'s reasoning rested on this unaltered section of the statute, damages for "pain and suffering," like loss of consortium, constitute noneconomic damage that the workers' compensation statutes do not compensate for. The Department did not pay out benefits for pain and suffering; therefore it cannot be "reimbursed" from amounts recovered for pain and suffering. We hold that an award for pain and suffering may not be used by the Department in its distribution calculation.

We affirm the Court of Appeals.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Susan Owens

Justice Charles W. Johnson

Justice Gerry L. Alexander

Justice Richard B. Sanders

Justice Debra L. Stephens

Justice Tom Chambers